

Attorney Docket No.:       **IFF-0017**  
Inventors:                   **Boden and Stumpf**  
Serial No.:                  **10/738,323**  
Filing Date:                **December 16, 2003**  
Page 4

#### **REMARKS**

Claims 1 and 3-7 are pending in the instant application. Claims 1 and 3-7 have been rejected. No new matter has been added by this amendment. Reconsideration is respectfully requested in light of the following remarks.

#### **I. Rejection of Claims Under 35 U.S.C. §103**

Claims 1-7 stand rejected under 35 U.S.C. 103(a) as being unpatentable over Wefler et al. in view of Orson, Sr. It is suggested that Wefler et al. teach all the featured elements of the instant invention, except for the specific oil or fragrance present in the active gel in the claimed range of percent weight and the emanator in physical contact with the end of the wick opposite the reservoir, which are provided by Orson, Sr. It is suggested that Orson, Sr. teaches that an emanator and wick combination can be used with a heating device to promote diffusion and therefore shows a teaching and motivation for providing an emanator on a wick in the apparatus of Wefler et al. Applicants respectfully traverse this rejection.

For a *prima facie* case of obviousness to exist, there must be "some objective teaching in the prior art or ... knowledge generally available to one of ordinary skill in the art [that] would lead that individual to combine the relevant teachings of the references." *In re Fine*, 837 F.2d 1071, 1074 (Fed. Cir. 1988). "The motivation, suggestion or teaching may come explicitly from statements in the prior art, the knowledge of one of ordinary skill in the art, or, in some cases the nature of the problem to be solved." *Kotzab*, 217 F.3d at 1370.

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Page 5

The presence or absence of a motivation to combine references is a question of fact, *In re Dembiczak*, 175 F.3d 994, 1000 (Fed. Cir. 1999), which is evaluated under the substantial evidence standard. *Gartside*, 203 F.3d at 1316. The Examiner's finding of a motivation to modify the wick of Wefler et al. with the emanator of Orson, Sr. rests on the generalized statement that "it would have been obvious to one having ordinary skill in the art at the time the invention was made to provide an emanator for the wick of Wefler et al, as taught by Orson, Sr. since with such a modification the addition of the emanator facilitates diffusion of the oil or fragrance into the surrounding environment by the process of evaporation" without regard to the desirability of modifying the wick of Wefler et al.

Under MPEP §2144.03, it is never appropriate to rely solely on "common knowledge" in the art without evidentiary support in the record, as the principal evidence upon which a rejection was based. *Zurko*, 258 F.3d at 1385, 59 USPQ2d at 1697. *Cf. Kotzab*, 217 F.3d at 1371 ("[P]articular findings must be made as to the reason the skilled artisan, with no knowledge of the claimed invention, would have selected these components for combination in the manner claimed."). The Examiner has not provided a factual record that establishes substantial evidence of a motivation to combine Wefler et al. with Orson, Sr.

Applicants submit that, given that Wefler et al. indicates that the heating element of the air freshener dispenser device disclosed therein functions as a heat source and promotes the dispersion of air freshener medium as a vapor into the atmosphere from an exposed wick (column 4, 49-52) and opines that the heating element offers a significant advantage (column 5, lines 53-54),

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Inventors:                   **Boden and Stumpf**  
Serial No.:                  **10/738,323**  
Filing Date:                **December 16, 2003**  
Page 6

there would be simply no motivation to modify the dispensing device of Wefler et al. to include an emanator. In particular, given that Wefler et al. offers no suggestion or motivation to make structural modifications to the dispensing device disclosed therein to further enhance diffusion of an oil or fragrance into the surrounding environment.

The mere fact that references can be combined or modified does not render the resultant combination obvious unless the prior art also suggests the desirability of the combination. *In re Mills*, 916 F.2d 680, 16 USPQ2d 1430 (Fed. Cir. 1990). MPEP §2143.01. In this regard, while Orson, Sr. discloses a diffuser surface which dispenses fragrance "by diffusion and/or convection; with or without the assistance of any blower or fan, heating device or other evaporation rate promoting means" (column 6, lines 41-52), Orson Sr. does not provide adequate direction or advantages to specifically use or not use an emanator with a heating element. The cited references simply provide no substantial evidence of a desirability and therefore motivation to provide an emanator, as in Orson, Sr., on a wick in the apparatus of Wefler et al.

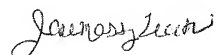
Thus, the statements made by the Examiner amount to no more than conclusory statements of generalized advantages and convenient assumptions about skilled artisans. However, such statements and assumptions are inadequate to support a finding of motivation, which is a factual question that cannot be resolved on "subjective belief and unknown authority." *Lee*, 277 F.3d at 1344. Therefore, the Examiner has not established a *prima facie* case of obvious under 35 U.S.C. 103(a) and it is respectfully requested that this rejection be reconsidered and withdrawn.

Attorney Docket No.: IFF-0017  
Inventors: Boden and Stumpf  
Serial No.: 10/738,323  
Filing Date: December 16, 2003  
Page 7

## II. Conclusion

Applicants believe that the foregoing comprises a full and complete response to the Office Action of record. Accordingly, favorable reconsideration and subsequent allowance of the pending claims is earnestly solicited.

Respectfully submitted,



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